United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7493

Original

To be argued by
JOSEPH P. NAPOLI

United States Court of Appeals

FOR THE SECOND CIRCUIT

MAX HABER, as executor of the Goods, Chattels and Credits that were of GEORGE HABER, Deceased and MAX HABER, individually,

Plaintiff-Appellant,

against

THE COUNTY OF NASSAU and ROBERT SEHLMEYER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT

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Cases Cited

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Preliminary Statement

Defendant's Brief (1) completely ignores plaintiff's evidence; (2) refuses to view the evidence most favorable to the plaintiff; and (3) refuses to give plaintiff the benefit of all reasonable references that can be drawn from the evidence.

The purported "uncontroverted facts" contained in defendant's Brief is merely the defendant's version of the

incident—a version which the jury, as a question of fact, refused to believe. The defendant erroneously presents as an uncontroverted fact that George Haber was shot and killed:

> ". . . during the course of a violent struggle with the defendant Sgt. Robert Sehlmeyer for possession and control of the officer's gun."

There was testimony presented by the plaintiff, which the jury by its verdict chose to believe, that George and the defendant did not struggle *for possession and control of the officer's gun.*

Alan Loeffler testified that the defendant was hitting George over the head with the gun and *that George did not have his hands on the gun at anytime* (A577). Mr. Loeffler and Donna Nelson testified that defendant had grabbed George by the hair, swung him around with the gun in the defendant's right hand; the defendant raised the gun fired it and the boy fell to the ground (A91, A577, A596).

The Nassau County Police Department form 350, is a search for fingerprints on the weapon and is part of the investigation where a gun is involved, and was not produced by the defendants at the time of trial (A252-256).

A neutron activation test and a paraphin test which are used to determine whether a person discharged a firearm was also not produced (A257-258).

Detective Frank Fehn assigned to investigate the case testified that:

> "I don't believe it ever came up that George Haber fired that gun, sir" (A206).

The above discussed purported uncontroverted fact is just one example of defendant's ignoring plaintiff's proof

and erroneously interpreting the evidence most favorable to the defendant instead of to the plaintiff.

Another flagrant example of the defendant coloring the facts in his favor are the statements that George Haber "molested" two girls and "attempted to pull her between some of the parked cars." In support of this contention, defendant refers to pages 509, 698-699, 709 and 712 of the Appendix.

Catherine Kragen testified that a boy her height grabbed Joan by the arm; Kragen then dug her nails into his arm and he grabbed her by the rear. She pushed him away without any difficulty and ran (A697-698, A708). Joan did not complain to her about any injury and it wasn't their intention to go for a police officer (A707, A710). The purported attempt by George to pull one of the girls between some of the parked cars was the defendant's version of the incident, which was contradicted by defendant's own witness, Catherine Kragen. In addition, the purported molestation is a conclusion drawn by the defendant and his attorneys and is not justified by the evidence.

Defendant in his Brief attempts to give the impression that it was uncontradicted that he had extreme difficulty in handling George Haber. Although there was such testimony in the record, there was also testimony that the guards at the Coliseum had no difficulty in handling George and Miss Kragen testified that she pushed George away without any difficulty. Defendant also testified that:

> "As I got to my feet and the subject was behind me with his arms around my waist and chest area, I had my hands on top of his wrists. As I got up I was able to pry his hand off of my chest. I swung around and brought his arm around with me into a hammer lock in back of him. (A421)

He was standing to his rear, had the boy's arm bent and behind his back, applying pressure upwards, with his left hand on the boy's left shoulder (A422-423)."

In addition, Alan Loeffler testified that defendant reached into the car and pulled George out of the car, the defendant was hitting George on the top of the head with the gun butt and George was holding his head screaming for his mother.

Detective Frank Fehn testified that the only blood found at the scene was that of George Haber's (A282).

In fact there was no testimony submitted by the defendant of any injuries sustained by him and no hospital records or medical reports of any kind showing injuries to the defendant were offered in evidence.

The above examples of misstatements by the defendant of the proof in this case and the repeated emphasis throughout defendant's brief to its motion for a new trial (see pages 5-7, 29-31) demonstrates the weakness of defendant's position. There was obviously sufficient facts in the record upon which the jury based its verdict and found in favor of the plaintiff.

POINT I

The jury held defendant liable based upon the trial Judge's charge to which defendant did not except which stated that if a defendant violated the provisions of the Penal Law, "such conduct in violation of the law is presumed negligent."

Defendant in Points I and III of his Brief erroneously argues that plaintiff did not establish a case of liability against the defendant. Without reviewing the arguments made in plaintiff's main Brief, it should be brought to the attention of this Court that the Trial Court charged without exception by the defendant that:

> ". . . if you find from the preponderance of the evidence in the case that the defendant Sehlmeyer by some act or failure to act violated the provisions of such section of the Penal Law, such conduct in violation of the law is presumed negligent."

The jury based upon the facts and law as charged by the Court, to which the defendant took no exception held the defendant liable for using deadly physical force under the circumstances. In *Bivens* v. *Six Unknown Named Agents,* 456 F2d 1339 (2d Cir. 1972) Judge Medina at page 1346 stated that:

> "The policy underlying the common law rule is equally applicable to federal police officers. We believe the long line of cases culminating in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and Mapp v. Ohio, 367 ILS 643, 81 S.Ct. 1684, 6 L. Ed.2d 1081 (1961), indicates a woeful laxity on the part of some police officers, state and federal, in complying with constitutional standards, and this laxity would only be encouraged by a grant

> of immunity. We do not argue with the reasoning of cases that support a contrary conclusion. It would be a sorry state of affairs if an officer had the 'discretion' to enter a dwelling at 6:30 A.M., without a warrant or probable cause, and make an arrest by employing unreasonable force."

It would be a sorry state of affairs if a police officer were permitted to use deadly physical force without complying with the requirements of the New York State Penal Law 35.50, which section the jury, following the Judge's charge, found as a question of fact that the defendant violated.

The factual finding by the jury that the defendant used deadly physical force causing the death of George Haber is not inconsistent with their finding that the defendant did not violate George Haber's constitutional and civil rights. It is apparent that the jury did not find present certain elements necessary to establish a civil rights cause of action, i.e., "Malice" or "reckless, wanton and willful abandon". See pages 900 to 913 of the Appendix for the full charge by the Trial Court on the first cause of action.

Malice was defined by the Trial Court as:

> "An act or a failure to act . . . if prompted or accompanied by ill will, or spite, or grudge . . ." (915)

None of these elements were necessary to prove a case under plaintiff's second and fourth claims.

Despite the fact that the Trial court charged the jury without exception with respect to plaintiff's second and fourth cause of action and defendant never raised below the issue of the necessity for an expert witness the defendant now for the first time upon appeal argues (see pages 19-20 of defendant's brief) that there was no expert testimony.

Miss Moore testified that the policeman got up with the boy and they both wa[illegible]d over to the car (A732). Sargeant Sehlmeyer testified that he intended to handcuff George when he got to the vehicle but "we never reached the vehicle" (A225-226). This testimony completely contradicts the testimony of Miss Moore defendant's own witness who testified that the policeman came over to the car, had a conversation with her and had a conversation on the radio (A732). Thus the jury could have found that the policeman—applying his own standard of handcuffing the boy as soon as he got to the police car—was negligence under the circumstances. This would be in addition to the jury finding that the defendant violated the New York State Penal Law and the rules and regulations of the Nassau County Police Department with respect to his handling George Haber and shooting and killing him.

POINT II

Defendant by ignoring and refusing to distinguish plaintiff's cases, concedes that George Haber was not contributorily negligent as a matter of law.

Defendant's brief completely ignores the decisions of the New York State Court of Appeals and of this Court that held that the issue of contributory negligence was a question of fact for the jury. Defendant in addition to citing the cases which are distinguished in plaintiff's main brief also cites and relies upon *Towne* v. *Park Motor Sales,* 7 A.D.2d 109, 180 N.Y.S.2d 553 aff'd. 7 N.Y.2d 707 (1959) a case which is not a death case, precedes the Court of Appeals pronouncement in *Rossman* v. *Lagrega,* 28 N.Y.2d 307 (1971) and is distinguishable on its facts from the case at bar. In *Towne,* Supra, the plaintiff was aware for several months that the floor on which he worked was caked with an accumulation of grease, gaso-

line and oil one quarter inch thick; in fact, he participated in the creation of the condition. On the day of the accident the plaintiff, who was the only person who regularly worked in this area, started a fire while using an electrically driven buffer. The plaintiff had placed the machine which had burst up into flames directly on the floor which was covered with oil, grease and gasoline, trampled on the fire and tried to use a bucket of sand to extinguish the fire. He failed to use other means that were available to him which included two separate sources of water. The Court held him to be contributorily negligent as a matter of law in using the ". . . the patently dangerous procedure of stamping the fire with his feet . . ."

In addition to ignoring plaintiff's cases defendant ignores the language in *Martin* v. *Herzog,* 228 N.Y. 164 (1920), a case cited at page 21 of defendant's brief, wherein Judge Cardozo stated at page 170 that:

> "We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster. A plaintiff who travels without them is not to forfeit the right to damages unless the absence of lights is at least a contributing cause of the disaster. To say that conduct is negligence is not to say that it is always contributory negligence. Proof of negligence in the air, so to speak will not do' (Pollock Torts (10th ed.), p. 472)."

Thus the alleged negligence or contributory negligence of a party is not sufficient to establish liability unless the jury finds as a question of fact that said negligence or contributory negligence was a *proximate cause* of the acci-

dent. In the case at bar the issue of proximate cause was charged to the jury and it found as a question of fact that any negligence on the part of George Haber was not a proximate cause of the defendant using excessive physical force under the circumstances and shooting and killing George Haber.

POINT III

The jury's verdict was not excessive with respect to damages should also be affirmed.

Without the benefit of a cross-appeal the defendant argues that the verdict below was excessive.

Defendant in arguing that the jury's verdict was excessive ignores the testimony by the plaintiff that George Haber was a student at Rockland County Community College, worked in the College library and worked after school at Rickles (A129-A131, A132). Mrs. Haber testified that George was a good student and was placed in a special progress class completing Junior High School in two years instead of three (A125). George always worked, after school from 5:00 P.M. to 10:00 P.M. and during the Summer (A127-A128). Mrs. Haber had an agreement with George that whatever he earned he would give her 25 percent (A128). George played the piano from the time he was four years old and took lessons from age 7 to 14 or 15 (A137).

In *Hart* v. *Forchelli,* 445 F2d 1018 (2d Cir 1971) this Court affirmed the award of damages by the jury of $252,000 in an automobile negligence death case involving an 18 year old.

In citing numerous State Court cases which this Court in *Hart* v. *Forchelli, supra,* stated are ". . . not particularly helpful to examine . . ." the defendant ignores

Kupitz v. *Elliott,* 42 A.D.2d 898, 347 N.Y.S.2d 705 (1st Dep't. 1973) which also involved a full time college student who was making intermittent payments to his parents from part time and Summer jobs.

With respect to the issue of conscious pain and suffering defendant conveniently ignores the fact that prior to the shooting George Haber was beaten over the head with the butt of the policeman's gun with a bullet being discharged from the gun going pass him and through the window of the police vehicle. There was also testimony that the police officer was swinging him around by his hair and that after he was shot he fell to the ground behind the police car near the exhaust pipe. Carbon monoxide was found in his blood at autopsy (A209-A213).

In *Caldecott* v. *Long Island Lighting Company,* 417 F2d 994 (2d Cir 1969) this Court permitted $10,000 for conscious pain and suffering where the only evidence of survival was that the decedent ". . . survived long enough to breath soot from fire into his lungs."

See also *United States* v. *Furumizo,* 381 F2d 965 (9th Cir 1967) a diversity case with almost instantaneous death from a plane crash with the Court upholding a $15,000 award for conscious pain and suffering. In comparing these 1967 and 1969 cases cited by the plaintiff the Court should take into consideration the rate of inflation and the diminution of the value of the dollar since these cases have been reported. Thus there was proof of conscious pain and suffering prior to the shooting, fear of death by the decedent during the time he was being hit over the head with the butt of defendant's gun and the first firing of the gun and inhalation of carbon monoxide after he fell to the ground and during the time he was dying. Based upon these facts and comparative cases in the Federal Courts the jury's award of $25,000 for George's conscious pain and suffering should also be sustained by this Court.

CONCLUSION

The judgment below should be reversed and the verdict of the jury reinstated.

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